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No Strict Scruting—The Court's Deferrential Position on Material Support to Terrorism in Holder v. Humanitarian Law Project

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NO STRICT SCRUTINY—THE COURT'S DEFERENTIAL POSITION ON MATERIAL SUPPORT TO TERRORISM IN *HOLDER V. HUMANITARIAN LAW PROJECT*

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I. INTRODUCTION

The fight against terrorism is doubtless a necessary and urgent undertaking, as well as one that evades more traditional forms of attack. As the government continues to expand its powers to go after terrorists and their supporters, questions arise as to whether and to what extent the government may infringe upon the constitutional rights of citizens in order to achieve the goal of ending terrorist attacks. One of the most frequently used methods

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of prosecuting terrorism is under a statute[1] that makes it a crime to provide material support to terrorist organizations.[2] But, the statute's constitutionality has been challenged on the grounds that it violates the rights of a donor of support to free speech and association, and lacks adequate due process procedures.

This note examines one specific challenge to the material support statute. *Humanitarian Law Project v. Holder*[3] represents the culmination of a twelve-year legal battle challenging the constitutionality of the material support statute.[4] First, this note will explore the history and evolution of the material support statute along with early legal challenges. Next, it will examine the specific facts of the plaintiffs' case in *Humanitarian Law Project*, as well as the plaintiffs' specific legal arguments. Then, it will describe the opinion of the majority of the Supreme Court and compare it to the dissent's opinion.

This note argues that both the majority and the dissent made critical analytical errors. First, I argue that both the majority and the dissent mishandled the Fifth Amendment analysis. Second, I assert that the majority should have addressed the plaintiffs' overbreadth challenge. Finally, I conclude that future litigants are not foreclosed from bringing an overbreadth challenge to the material support statute.

II. HISTORY

A. *18 U.S.C. Section 2339B*

Following the World Trade Center bombings in 1993, Congress passed a series of bills aimed at curtailing economic support to terrorist activities.[5] One of these, codified at 18 U.S.C. § 2339A, prohibited the provision of "material support or

1. 18 U.S.C. § 2339B (2006).

2. Randolph N. Jonakait, *The Mens Rea for the Crime of Providing Material Resources to a Foreign Terrorist Organization,* 56 BAYLOR L. REV. 861, 862 (2004) (noting that nearly every terrorism prosecution since 9/11 has included a charge of material support to terrorist organizations).

3. 130 S.Ct. 2705 (2010).

4. *Id.* at 2716.

5. David Henrik Pendle, *Charity of the Heart and Sword: The Material Support Offense and Personal Guilt,* 30 SEATTLE U. L. REV. 777, 783 (2007) (arguing that a recklessness standard is the most appropriate fit to § 2339B because it passes constitutional muster under *Scales* while still preserving the government's ability to deter support for terrorism).

resources . . . knowing or intending that they are to be used . . . [to] violat[e]" any of several offenses.[6] Material support was defined as:

> [A]ny property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (1 or more individuals who may be or include oneself), and transportation, except medicine or religious materials.[7]

Section 2339A contained several prosecutorial hurdles,[8] however, which led Congress to amend the statute following the bombing of the Alfred P. Murrah building in Oklahoma City in 1995.[9] As amended, the statute created a new material support provision codified at 18 U.S.C. § 2339B as well as a foreign-terrorist designation scheme codified at 8 U.S.C. § 1189.[10]

Once designated as foreign terrorist organization (FTO), section 2339B makes it a criminal offense to provide material support to that organization or persons affiliated with it. As the statute was originally written, a person violated the statute by knowingly providing material support or resources (as defined by

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6. 18 U.S.C. § 2339A(a) (2006).

7. *Id.* § 2339A(b)(1).

8. One commentator identified two significant hurdles: First, section 2339A required a finding of specific intent, which meant that the prosecution had to show the donor intended the donation to be used to further some illegal purpose. Pendle, *supra* note 5, at 783. Second, it required the prosecution to relate the offense back to some specific act of terrorism. *Id.*

9. *Id.* at 784.

10. Anti-Terrorism and Effective Death Penalty Act (AEDPA) of 1996, PUB. L. NO. 104-132, 112 STAT. 1214; *see* Benjamin Yaster, *Resetting Scales: An Examination of Due Process Rights in Material Support Prosecutions*, 83 N.Y.U. L. REV. 1353, 1363 (2008). Under section 1189, Congress gave the Secretary of State the authority to designate certain foreign groups as foreign terrorist organizations (FTOs) which would subject them to several restrictions, including the freezing of domestic assets and barring its representatives from entering the United States. 18 U.S.C. § 1189 (2006). In order to be designated an FTO, the Secretary of State would have to find that (1) the group is a "foreign organization," (2) that it engages in "terrorist activity . . . or terrorism," or has "the capability and intent to engage in terrorist activity or terrorism," and, (3) it "threatens the security of United States nationals or the national security of the United States." *Id.* § 1189(a)(1). Organizations designated as an FTO have the right to an administrative review of their status, which, if denied can be requested again once every two years. *Id.* § 1189(a)(4)(B).

section 2339A) to an FTO.[11] While the statute originally called for a maximum of a ten-year prison sentence, Congress amended the statute in 2001 with the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT Act) to increase the sentence to fifteen years, or to life in prison if a death results from the violation.[12]

Questions soon arose as to what Congress intended by requiring that a donor "knowingly" provide material support to an FTO in order to violate the statute. Does "knowingly" modify "material support" or "to a foreign terrorist organization" or, does it merely modify "provides?"[13] Three statutory interpretations were proposed: (1) a strict-liability standard, whereby the statute is violated any time someone consciously provides material support when that support goes to an FTO regardless of whether the donor knew the recipient was an FTO; (2) a knowledge requirement, whereby the statute is not violated unless the donor had actual knowledge that the organization was designated an FTO; or (3) a specific-intent standard, which requires that the donor give support with the purpose of aiding illegal activities.[14] These various interpretations of the meaning of section 2339B were tested in a series of court cases.

B. Earlier Cases Interpreting Section 2339B

Challenges to section 2339B began with the plaintiffs whose case is the subject of this note. In 1998, Humanitarian Law Project (HLP), HLP's president, a physician, and five other nonprofit groups filed suit in federal court in the central district of California challenging the constitutionality of the statute.[15] Plaintiffs sought to enjoin enforcement of the statute against their activities, which were intended to provide humanitarian and political support to two organizations designated as FTOs.[16] The plaintiffs asserted that certain terms in the definition of material support were

11. 18 U.S.C. § 2339B(a)(1) (2006).

12. Uniting and Strengthening America By Providing Appropriate Tools Required To Intercept and Obstruct Terrorism (USA PATRIOT Act) Act of 2001, PUB. L. NO. 107-56, § 810(d), 115 Stat. 272, 380.

13. Jonakait, *supra* note 2, at 873.

14. Pendle, *supra* note 5, at 784-85.

15. Humanitarian Law Project v. Holder, 130 S.Ct. 2705, 2713-14 (2010).

16. *Id.* at 2714.

unconstitutionally vague and that as applied to them the statute's penalties constituted guilt by association since the statute contained no specific-intent provision.[17] The district court granted the injunction in part on the grounds that the terms "personnel" and "training" within the definition of material support were unconstitutionally vague.[18] The Court of Appeals for the Ninth Circuit affirmed the district court.[19] It held that not only were the challenged terms unconstitutionally vague,[20] but also that the Government's interpretation of the statute as requiring neither knowledge nor intent to lend support to a terrorist organization was unconstitutional.[21] Following a line of cases that construed criminal statutes as requiring at a minimum a showing of intent where Congress failed to include one, the Court of Appeals interpreted section 2339B as requiring that "a defendant knew of the organization's designation as a terrorist organization or proof that a defendant knew of the unlawful activities that caused it to be so designated."[22]

Just as the Ninth Circuit was about to grant a rehearing of the three-judge panel decision in 2003, Congress amended section 2339B to include a knowledge standard that mirrored the Ninth Circuit's standard.[23] The Intelligence Reform and Terrorism Prevention Act of 2004 (IRTPA) amended section 2339B to read:

> To violate this paragraph, a person must have knowledge that the organization is a designated terrorist organization . . . that the organization has engaged or engages in terrorist activity . . . or that the organization has engaged or engages in terrorism . . . .[24]

Congress also sought to clarify the definitions of material support deemed unconstitutionally vague by the Ninth Circuit. It added to the definition of material support in section 2339A the term "service."[25] It defined training to mean "instruction or

17. *Id.*
18. *Id.*
19. *Id.; see also* Humanitarian Law Project v. U.S. Dep't of Justice, 352 F.3d 382, 385 (9th Cir. 2003).
20. *Humanitarian Law Project,* 352 F.3d at 403.
21. *Humanitarian Law Project,* 352 F.3d at 397.
22. *Humanitarian Law Project,* 352 F.3d at 400.
23. *Humanitarian Law Project,* 130 S.Ct. at 2715; *see also* Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458 § 6603, 118 Stat. 3638, 3762-64 (2004).
24. Intelligence Reform and Terrorism Prevention Act § 6603.
25. *Id.* § 6603(b)(1).

teaching designed to impart a specific skill, as opposed to general knowledge."[26] Expert advice or assistance was further defined to mean "advice or assistance derived from scientific, technical or other specialized knowledge."[27] Finally, personnel was defined in such a way as to make an important distinction between actions that are undertaken independently of the FTO and those which are done in coordination with them:

> No person may be prosecuted under [section 2339B] in connection with the term "personnel" unless that person has knowingly provided, attempted to provide, or conspired to provide a foreign terrorist organization with 1 or more individuals (who may be or include himself) to work under that terrorist organization's direction or control or to organize, manage, supervise, or otherwise direct the operation of that organization. Individuals who act entirely independently of the foreign terrorist organization to advance its goals or objectives shall not be considered to be working under the foreign terrorist organization's direction and control.[28]

In response to these statutory changes, the Ninth Circuit remanded the case to the district court for further proceedings on the question of the vagueness of the statute's terms.[29] At this point, the district court consolidated the plaintiffs' claims with a separate case the plaintiffs had filed to challenge the addition of the term "expert advice and assistance" pursuant to a 2001 amendment of section 2339B.[30] The district court also permitted the plaintiffs to challenge the addition of the term service to the definition of material support.[31] The district court once again granted a partial

26. *Id.* § 6603(b)(2).
27. *Id.* § 6603(b)(3).
28. *Id.* § 6603(h).
29. Humanitarian Law Project v. Holder, 130 S. Ct. 2705, 2715 (2010).
30. *Id.* In 2001, Congress passed the USA PATRIOT act which amended the definition of material support in 18 U.S.C. § 2339A(b) to include the term "expert advice or assistance." Uniting and Strengthening America By Providing Appropriate Tools Required To Intercept and Obstruct Terrorism (USA PATRIOT Act) Act of 2001, Pub. L. No. 107-56, § 805(a)(2)(B), 115 Stat. 272, 377. The *Humanitarian Law Project* plaintiffs filed another lawsuit in 2003 challenging this additional term in the statute. Humanitarian Law Project v. Ashcroft, 309 F. Supp. 2d 1185 (C.D. Cal. 2004). This case along with the earlier case challenging the terms "training" and "personnel" were consolidated. Humanitarian Law Project v. Gonzales, 380 F. Supp. 2d 1134, 1139 (C.D. Cal. 2005).
31. *Gonzales*, 380 F. Supp. 2d at 1151 n.24.

injunction to the plaintiffs on vagueness grounds.[32] The Ninth Circuit took up the appeal once again.[33]

This time around, the Ninth Circuit was not persuaded that the statute's mens rea requirement, as amended, failed to pass constitutional muster.[34] However, the court agreed with the district court that the definitions of training, expert advice or assistance, and service were unconstitutionally vague as applied to the plaintiffs since these terms covered constitutionally protected forms of speech.[35] Finally, the Supreme Court granted the Government's petition for certiorari.[36]

III. HOLDER V. HUMANITARIAN LAW PROJECT

A. *Facts*

The plaintiffs sought a declaratory judgment and injunction to stop the enforcement of section 2339B against their attempts to provide humanitarian support to two FTOs, the Kurdistan Workers' Party (PKK) and the Liberation Tigers of Tamil Eelam (LTTE).[37]

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32. *Id.* at 1156.

33. Humanitarian Law Project v. Mukasey, 552 F.3d 916 (9th Cir. 2009), *aff'd in part and rev'd in part*, Holder v. Humanitarian Law Project, 130 S. Ct. 2705, 2712 (2010).

34. The Ninth Circuit acknowledged that "guilt is personal." *Id.* at 925 (citing Brown v. United States, 334 F.2d 488, 495 (9th Cir. 1964)). But, the Court noted that:

> [S]ection 2339A already requires the government to prove that the donor defendant provided "material support or resources" to a designated foreign terrorist organization with *knowledge* that the donee organization is a designated foreign terrorist organization, or with *knowledge* that the organization is or has engaged in terrorist activities or terrorism. 18 U.S.C. § 2339B(a). As amended, AEDPA section 2339B(a) complies with the "conventional requirement for criminal conduct-awareness of some wrongdoing."

Id. at 926 (citing Staples v. United States, 511 U.S. 600, 606–07 (1994)).

35. The Ninth Circuit concluded that even if reasonable persons could distinguish between permissible and impermissible types of training, the term is still unconstitutional since "[it] could still be read to encompass speech and advocacy protected by the First Amendment." *Id.* at 929. Similarly, citing the fact that "expert advice or assistance" was said to illegalize the filing of an amicus brief on behalf of an FTO litigant at oral argument, the Ninth Circuit ruled that this term is also unconstitutionally vague since "[it] continues to cover constitutionally protected advocacy." *Id.* at 930. Finally, "service" was also held unconstitutional because "it is easy to imagine protected expression that falls within the bounds of the term 'service.'" *Id.* (citing *Gonzales*, 380 F. Supp. 2d at 1152).

36. Holder v. Humanitarian Law Project, 130 S.Ct. 48 (2009).

37. Humanitarian Law Project v. Holder, 130 S.Ct. 2705, 2713–14 (2010).

Both the PKK and the LTTE were organizations that had been linked to terrorist activities, but also had as their mission the establishment of an independent state and the provision of humanitarian support for their respective ethnic groups that had historically been the victims of oppression.[38] According to the plaintiffs, the activities they planned to undertake (but feared would be barred by section 2339B) included training members of these groups in humanitarian and international law, and engaging in political advocacy on their behalf.[39] The plaintiffs had no design to further the illegal activities of either the PKK or the LTTE.[40]

B. Plaintiffs' Legal Challenges to Section 2339B

In their legal challenge, the plaintiffs argued that section

38. The mission of the PKK is to "establish an independent, democratic Kurdish state in the Middle East." Pendle, *supra* note 5, at 780 (citing FED'N AM. SCIENTISTS, INTELLIGENCE RESOURCE PROGRAM, KURDISTAN WORKERS' PARTY (PKK), http://www.fas.org/irp/world/para/pkk.htm (last visited Feb. 18, 2007)). Since the collapse of the Ottoman Empire, the Kurds have been stateless. They have been forced by various states to stop speaking their language or stop wearing their traditional clothing, and have further been subjected to "outright annihilation." *Id.* The PKK has been involved in rural-based insurgency activities but have also sponsored international political forums, peace conferences, and Kurdish cultural festivals, as well as setting up their own quasigovernmental structure in parts of Turkey. *Id.* at 781 (citing Humanitarian Law Project v. United States Dep't of Justice, 352 F.3d 382, 389 (9th Cir. 2003). Similarly, the LTTE seeks to protect the human rights of Tamils in Sri Lanka and achieve self-determination and has set up a governmental structure for over 500,000 Tamils. *Id.* (quoting *Dep't of Justice,* 352 F.3d at 390).

39. The Ninth Circuit described the plaintiffs' intended activities as follows:

> Plaintiffs who support PKK want: (1) to train members of PKK on how to use humanitarian and international law to peacefully resolve disputes, (2) to engage in political advocacy on behalf of Kurds who live in Turkey, and (3) to teach PKK members how to petition various representative bodies such as the United Nations for relief.
>
> Plaintiffs who support LTTE want: (1) to train members of LTTE to present claims for tsunami-related aid to mediators and international bodies, (2) to offer their legal expertise in negotiating peace agreements between the LTTE and the Sri Lankan government, and (3) to engage in political advocacy on behalf of Tamils who live in Sri Lanka.

Humanitarian Law Project v. Mukasey, 552 F.3d 916, 921 n.1 (9th Cir. 2009). However, much of the aid intended for the LTTE was taken off the table in response to a military defeat leaving the LTTE with "no role in Sri Lanka." *Holder,* 130 S.Ct. at 2716-17 (quoting Transcript of Oral Argument at 62, *Holder,* 130 S.Ct. 2705 (2010) (Nos. 08-1498, 09-89)).

40. *Id.* at 2717.

2339B violated their constitutional rights insofar as it (1) violated their Fifth Amendment right to due process and fair notice,[41] (2) violated their First Amendment right to freedom of speech,[42] and (3) violated their First Amendment right to freedom of association.[43] The plaintiffs further contended that if the Court were to adopt a more stringent mens rea requirement, the Court could avoid the constitutional questions altogether.[44]

Under the Fifth Amendment, a statute must provide fair notice to all persons that certain conduct they might wish to engage in would be a violation of statute.[45] Furthermore, where a statute interferes with the right of free speech or association protected under the First Amendment, a more stringent test generally should be applied.[46] To the extent that the definitional terms in section 2339B, and those terms borrowed from section 2339A, set up an unclear distinction between what is general and what is specific support, and also between what is coordinated and what is independent support, the plaintiffs argued that the statute cannot survive judicial review. Moreover, since the statute restricts otherwise protected speech, it would have to survive the application of a very strict standard of clarity.

In support of the assertion that section 2339B impermissibly restricts their freedom of speech, the plaintiffs argued that the statute as applied to their activities amounted to a content-based speech restriction, even though the law on its face appears to apply

41. *See* Reply Brief for Humanitarian Law Project at 7, 9-10, 12-15, *Holder,* 130 S.Ct. 2705 (Nos. 08-1498, 09-89).

42. *See* Reply Brief for Humanitarian Law Project at 26-27, *Holder,* 130 S.Ct. 2705 (Nos. 08-1498, 09-89).

43. *See* Reply Brief for Humanitarian Law Project, *supra* note 41, at 36.

44. The plaintiffs appealed to the Court's prudential doctrine of constitutional avoidance to urge the Court to narrow the statute's application by requiring a stricter mens rea requirement. Reply Brief for Humanitarian Law Project, *supra* note 41, at 39-40. The specific standard the plaintiffs sought to include in the statute was that section 2339B should require "proof of intent to further a designated group's terrorist activities when applied to speech." *Id.* at 39.

45. *See, e.g.,* United States v. Williams, 553 U.S. 285, 286 (2008) ("A conviction fails to comport with due process if the statute under which it is obtained fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement.").

46. *See* Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc., 455 U.S. 489, 499 (1982) ("[T]he most important factor affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights. If, for example, the law interferes with the right of free speech or of association, a more stringent vagueness test should apply.").

only to otherwise unprotected conduct.[47] Such content-based restrictions merit strict scrutiny.[48] The plaintiffs argued that section 2339B cannot survive strict scrutiny since the government cannot justify a restriction on speech which is not intended to incite violence.[49]

The plaintiffs further argued that section 2339B violated their First Amendment right to freely associate.[50] First, they argued that section 2339B impermissibly makes it a crime to associate with designated organizations.[51] Second, they argued that the statute operates on the basis of guilt by association, which is prohibited by both the First and Fifth Amendments.

Finally, the plaintiffs asserted that all these constitutional issues could be avoided if only the Court would adopt a stricter mens rea requirement which would so limit the scope of the statute's application so as to make the regulation conform to constitutional principles.[52] Were the Court to grant the plaintiffs injunctive relief based upon statutory grounds, the Court would not need to decide the constitutionality of section 2339B.[53] According to the plaintiffs, a decision to reinterpret the mens rea standard to avoid the constitutional questions would be consistent with the canon of constitutional avoidance.[54] Moreover, the Court has previously

47. The government took the position that section 2339B in no way was a restriction on speech since all it did was prohibit the donation of material support.

48. *See, e.g.*, Cohen v. California, 403 U.S. 15 (1971) (holding where a statute appears on its face only to restrict non-speech conduct, if it incidentally restricts speech it still must be reviewed using strict scrutiny).

49. Relying on the case of *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622 (1994), the plaintiffs asserted that in order to survive a constitutional challenge, the proponent of a statute must show that the statute seeks to remedy real, not merely conjectural harms, and that "the regulation will in fact alleviate these harms in a direct and meaningful way." *Id.* at 664.

50. Reply Brief for Humanitarian Law Project, *supra* note 41, at 36.

51. The plaintiffs relied upon the case of *De Jonge v. Oregon*, 299 U.S. 353 (1937) to support their argument that section 2339B impermissibly prohibits constitutionally protected assembly. Reply Brief for Humanitarian Law Project, *supra* note 41, at 37.

52. Reply Brief for Humanitarian Law Project, *supra* note 41, at 39-42.

53. *Id.* at 40.

54. *Id.* The plaintiffs cited *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568 (1988) for the proposition that the Court traditional will avoid constitutional questions whenever possible. *Id.* at 39 n.19.

> "As was stated in *Hooper* v. *California*, 155 U.S. 648, 657 (1895), "the elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality." This approach not only reflects the prudential concern that constitutional issues not be needlessly confronted, but also recognizes that Congress, like this Court,

interpreted statutes lacking a strict mens rea requirement to include one in order to save it from attack on constitutional grounds.[55]

C. Majority Opinion

These arguments held little sway over the majority of the Court, however. Chief Justice Roberts, writing for the majority, disagreed that the Court had any obligation to interpret the statute to include a heightened mens rea requirement since that language simply wasn't in the statute.[56] Furthermore, he concluded that section 2339B did not violate the plaintiffs' due process rights through guilt by association because the statute did not prohibit mere membership in a group.[57] He went on to state that the plaintiffs' other Fifth Amendment claim for vagueness lacked merit because the statute's terms were clear enough to provide fair notice to persons of ordinary intelligence.[58] According to the Chief Justice, the revisions codified by Congress in the 2003 amendments to the statute rendered the statute sufficiently clear so as to provide proper notice as required under due process.[59]

> is bound by and swears an oath to uphold the Constitution. The courts will therefore not lightly assume that Congress intended to infringe constitutionally protected liberties or usurp power constitutionally forbidden it."

Id. at 575.

55. *Scales v. United States,* 367 U.S. 203 (1961). The Court held that although the Smith Act did not expressly include a mens rea requirement to show the defendant acted with a specific intent to further the illegal aims of the organization that such a requirement could be inferred in order to make the statute constitutional. *Id.* at 222.

56. Holder v. Humanitarian Law Project, 130 S.Ct. 2705, 2717 (2010).

57. *Id.* at 2718.

58. *Id.* at 2720. Specifically, Chief Justice Roberts cited the plaintiffs' use of the terms "training" and "expert advice" at oral argument, "demonstrating that these common terms readily and naturally cover plaintiff's conduct." *Id. at 2721.*

59. *Id.* at 2720. According to the majority of the Court, the plaintiffs' proposed activities fell squarely within these statutorily defined categories of prohibited actions. *Holder,* 130 S.Ct. at 2720-22. The Court applied a sort of reasonable-person standard to determine whether each term captured the plaintiffs' activities. *Id.* Hence, training fit with "instruction on resolving disputes through international law" because it "imparts a 'specific skill,' not 'general knowledge.'" *Id.* at 2720. And expert advice fit with "teaching . . . to petition for humanitarian relief" because this involves "advice derived from . . . 'specialized knowledge.'" *Id.* However, the plaintiffs failed to describe their activities with regard to the terms "personnel" and "service" in sufficient enough detail for the court to make any determinations based upon a pre-enforcement challenge. *Id.* at 2722. Nevertheless, the Court stated that both terms either expressly or impliedly

However, the Court agreed with the plaintiffs that section 2339B, as applied to the plaintiffs, amounted to a content-based restriction on speech, which would require the application of strict scrutiny.[60] The Court expressed little doubt that fighting terrorism is a sufficiently compelling state interest to satisfy the first part of the strict scrutiny test.[61] Turning to the second part of the test, whether the statute is narrowly tailored, the Court gave broad deference to Congress and the executive branch in its appraisal of whether section 2339B is a necessary weapon in the arsenal against terrorism.[62] While recognizing that the impact of humanitarian aid on FTOs is an "empirical question,"[63] the Court in fact based its evaluation of section 2339B on little other than the bare assertions found in certain congressional findings,[64] statements of support from the State Department,[65] and a kind of "common sense."[66] The Court ultimately based its finding that the law was narrowly tailored on a tautology: the law was passed because it was necessary and it could not have been necessary were it not narrowly tailored. Therefore, humanitarian aid must be fungible, otherwise the government wouldn't have prohibited it. Similarly, the Court held that section 2339B did not infringe the plaintiffs' right of

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only covered those activities that are performed "in coordination with, or at the direction of, a foreign terrorist organization." *Id.*

60. *Id.* at 2723. Specifically, the Court agreed with the plaintiffs that section 2339B fell into the same category of as the statute at issue in *Cohen*. *Id.* at 2724.

61. *Id.* at 2724 ("[T]he Government's interest in combating terrorism is an urgent objective of the highest order.").

62. *Id.* at 2727.

63. *Id.* at 2724.

64. *Id.* A critical finding often invoked by proponents of section 2339B is the statement by Congress that "foreign organizations that engage in terrorist activity are so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct." Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 301(a)(7), 110 Stat. 1214, 1247. The Court relied upon this statement as well as the fact that when Congress enacted section 2339B it repealed an exception for humanitarian aid found in section 2339A to conclude that Congress intended to prohibit the plaintiffs' activities. *Holder*, 130 S.Ct. at 2725.

65. *Id.* at 2727. The Court relies upon an affidavit from the State Department in which the department expresses "strong[] support" for Congress's findings and the regulatory scheme embodied by section 2339B and related provisions. *Id.* According to the State Department, "it is highly likely that any material support to [FTOs] will ultimately inure to the benefit of their criminal, terrorist functions—regardless of whether such support was ostensibly intended to support non-violent, non-terrorist activities." *Id.* (quoting McKune Affidavit at 133, ¶ 8 *Holder*, 130 S.Ct. 2705 (Nos. 08-1498, 09-89)).

66. *Holder*, 130 S.Ct. at 2726 n.6.

association since the law exempted mere membership, albeit while prohibiting most forms of active membership.[67]

D. Dissenting Opinion

Justice Breyer, writing on behalf of himself and Justices Ginsburg and Sotomayor, took issue with the majority's deference to the executive and legislative branches.[68] The dissent argued that it was the duty of the judiciary in this case to determine whether "the application of the statute to the protected activities before us *help achieve* that important security-related end[.]"[69] The dissent examined two main arguments put forth by the Government: (1) that such material support is fungible, and (2) that this support legitimizes and thereby strengthens FTOs.[70]

As to the first argument, the dissent found no compelling evidence that such humanitarian aid is fungible, all common sense aside.[71] As to the second argument, the dissent pointed out that the statute does nothing to curtail legitimizing FTOs, and even if it did there is no reason that such a restriction could be viewed as constitutional.[72] Both the Government and the majority of the Court emphasized that the statute does not prohibit membership in an FTO or independent advocacy on behalf of an FTO, both of which could logically further the legitimacy of an organization.[73] Moreover, First Amendment challenges would never be won if a legitimizing effect would constitute sufficient grounds for dismissal, since "[s]peech, association, and related activities on behalf of a group will often, perhaps always, help to legitimate that group."[74]

Finding that the Government failed to meet its burden of showing that its interest justified criminalizing otherwise protected speech, the dissent concluded that it was uncertain whether the

67. *Id.* at 2730.
68. *Id.* at 2732 (Breyer, J. dissenting).
69. *Id.* at 2734 (emphasis in original).
70. *Id.* at 2735-37.
71. "There is no *obvious* way in which undertaking advocacy for political change through peaceful means . . . is fungible with other resources that might be put to more sinister ends in the way that donations of money, food, or computer training are fungible." *Id.* at 2735 (emphasis in original). Following upon this assertion, Breyer concludes that the Government must come up with some evidence to support its claim that such aid is fungible. *Id.*
72. *Id.* at 2736-37.
73. *Id.* at 2736.
74. *Id.*

Government's interpretation of section 2339B was constitutional.[75] Like the majority's opinion, the dissent first considered whether the doctrine of constitutional avoidance could decide the issue.[76] Unlike the majority's opinion, however, the dissent concluded that it could.[77] The dissent found that with a heightened mens rea requirement, the statute would pass constitutional muster without further consideration.[78] In order to arrive at this interpretation, the dissent read the statutory language such that the word "knowingly" modified the word "material."[79] Thus, a defendant would have to know that he or she was providing the kind of support that would be material to the cause of furthering an FTO's illegal activities.[80] This would be easy to prove when the defendant was providing money or weapons since knowledge that these items would further terrorist acts can be fairly inferred.[81] But, where humanitarian aid is at issue, the Government would have a higher burden of showing that such aid did go to advance terrorist objectives.[82]

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75. *Id.* at 2739.

76. *See id.* at 2717-18 (majority opinion), 2740 (Breyer, J. dissenting).

77. *Id.* at 2740 (Breyer, J. dissenting). The dissent argued that where "a construction of the statute is fairly possible by which the [constitutional] question may be avoided" that the court "must" adopt this interpretation. *Id.* (quoting Crowell v. Benson, 285 U.S. 22, 62 (1932). This argument reduced the issue to whether there would be an alternative interpretation that is "fairly possible." *Id.*

78. *Id.*

79. *Id.* at 2740.

80. *Id.* Specifically, the dissent phrased their interpretation as requiring that:

> [T]he defendant would have to know or intend (1) that he is *providing* support or resources, (2) that he is providing that support *to a foreign terrorist organization,* and (3) that he is providing support that is *material,* meaning (4) that his support bears a significant likelihood of furthering the organization's terrorist ends.

Id. at 2740-41. The dissent argued that this interpretation is reasonable since the terms at issue (training, expert advice or assistance, personnel, and service) all fall under the definition of material support, and therefore "these activities fall within the statute's scope only when they too are 'material.'" *Id.* at 2741.

81. *Id.* at 2741. The dissent recognized that certain forms of aid are "inherently more likely to help an organization's terrorist activities, either directly or because they are fungible in nature." *Id.* The dissent provided a list of such items: currency, property, monetary instruments, financial securities, financial services, lodging, safehouses, false documentation or identification, weapons, lethal substances, or explosives, and the like. *Id.*

82. *Id.*

IV. ANALYSIS

A. *Mens Rea: Protecting Due Process and the Freedom of Association*

1. *The Majority Opinion: Punting the* Scales *Test*

In *Scales v. United States*,[83] Junius Irving Scales was convicted under the Smith Act for his membership in the Communist Party.[84] The Smith Act made it a felony to hold membership in any organization that advocated the violent overthrow of the United States government.[85] Scales' Fifth Amendment challenge to the statute argued that a statute that imposes a criminal sanction based solely on the fact of mere membership, and nothing more, must violate the due process clause.[86] The Court agreed with Scales.[87] The *Scales* court held that the Smith Act must be interpreted to mean that only "'active' members having also a guilty knowledge and intent" could be successfully prosecuted.[88] In other words, the Court imposed a specific-intent requirement to bring the statute into compliance with Fifth Amendment due process requirements.

The Court in *Humanitarian Law Project v. Holder (HLP)* dismissed *Scales* as inapposite by interpreting *Scales* to hold that a heightened mens rea is required only where the statute prohibits membership in a group.[89] But, by limiting *Scales* to its facts, the *HLP* Court ignored the plain language of the *Scales* decision. In its decision, the *Scales* Court wrote:

> In our jurisprudence guilt is personal, and when imposition of punishment on a status or on conduct can only be justified by reference to the relationship of that status or conduct to other concededly criminal activity (here advocacy of violent overthrow), that relationship must be sufficiently substantial to satisfy the concept of personal guilt in order to withstand attack under the Due Process Clause of the Fifth Amendment.[90]

By implicating both status and conduct, the *Scales* court expressly contemplated situations where some type of conduct

83. 367 U.S. 203 (1961).
84. *Id.* at 205.
85. *Id.* at 206 n.1.
86. *Id.* at 225.
87. *Id.* at 228.
88. *Id.* at 228.
89. Humanitarian Law Project v. Holder, 130 S. Ct. 2705, 2718 (2010).
90. *Scales*, 367 U.S. at 224-25.

beyond mere membership was the basis for prosecution. Moreover, historically the judiciary has applied *Scales* to situations involving "the furnishing of personnel, training, and services" to organizations engaged in illegal activity as well as to statutes which criminalize more than mere membership.[91]

Furthermore, the *Scales* holding did not require that the conduct at issue be protected as speech or association under the First Amendment. It was not the character of the conduct at issue, but rather the possibility that a statute would impute guilt to an actor vicariously that specifically troubled the Court.[92] The Court treated the First Amendment and Fifth Amendment attacks on the Smith Act entirely separately.[93] In addressing the First Amendment concerns, the Court considered whether the statute overly constrained the right of association, impermissibly criminalizing associational activity that does not further illegal ends.[94] But, in addressing the Fifth Amendment arguments, the Court never stated that its analysis under due process only applied to protected speech.[95] Under this due process analysis, the Court was concerned with membership as a measure of whether such status is sufficiently substantial to qualify as illegal activity since this is what the defendant in *Scales* was accused of.[96] Thus, the Court's concern about membership is not whether a member's First Amendment rights are being safeguarded, but whether there is a sufficient level

91. In *Hellman v. United States*, 298 F.2d 810 (9th Cir. 1961) the 9th Circuit overturned a conviction under the Smith Act where the defendant was organizing new members, teaching Communism, and soliciting contributions. *Id.* And, in *Rucker v. Davis*, 237 F.3d 1113 (9th Cir. 2001) the Ninth Circuit applied *Scales* to hold a statute unconstitutional which provided that tenants could be evicted for illegal drug activity that was going on in the household but without their knowledge.

92. The *Scales* court in its Fifth Amendment analysis is most concerned with at what point conduct might rise to the level of criminality. The Court stated:

> It may indeed be argued that such assent and encouragement do fall short of the concrete, practical impetus given to a criminal enterprise which is lent for instance by a commitment on the part of a conspirator to act in furtherance of that enterprise. A member, as distinguished from a conspirator, may indicate his approval of a criminal enterprise by the very fact of his membership without thereby necessarily committing himself to further it by any act or course of conduct whatever.

Scales, 367 U.S. at 227-28.

93. *Id.* at 224-30.

94. *Id.* at 229.

95. *Id.* at 224-28. In fact, the *Scales* Court stated that its examination would be made "independently of the claim made under the First Amendment." *Id.* at 225.

96. *Id.*

of personal guilt in mere membership or in conduct not intended to further an organization's illegal aims. Therefore, the *HLP* Court's argument that *Scales* is inapposite because *Scales* only dealt with the right of mere membership missed the mark.

Additionally, the *HLP* Court's argument that the plain language of section 2339B does not support the heightened mens rea interpretation is antithetical to the traditional common law rule. It is axiomatic that for a defendant to be held guilty of a criminal offense, he or she must be held individually culpable.[97] "[T]he Court routinely presumes as a matter of statutory construction that Congress intends to include a mens rea element in its criminal statutes."[98] And, this interpretation stands to reason, since without some mens rea requirement, a person may be culpable merely for his or her proximity to illegal conduct, implicating not only due process, but also associational rights protected by the Constitution.

2. The Dissent: Skirting the Analysis

Having removed the impediments to a judicial reinterpretation of section 2339B to include a heightened mens rea requirement, what should that requirement be? The *Scales* test examines the "quantum of [the defendant's] participation in the organization's alleged criminal activity."[99] Where there is only a

97. Yaster, *supra* note 10, at 1356. However, it is true that not all crimes contain a scienter or mens rea requirement. Certain "public welfare offenses" are crimes of strict liability, but as such are "limited and disfavored." Jonakait, *supra* note 2, at 875 (citing U.S. v. United States Gypsum Co., 438 U.S. 422, 437-38 (1978)). According to Jonakait:

> Such crimes, often labeled public welfare offenses, usually concern dangerous products or items that are often subject to extensive regulation in the interest of public safety. Such crimes can dispense with the normal mens rea requirements because those involved with dangerous products can reasonably be expected to be aware of the possibility of regulation.

Id. at 875.

98. Yaster, *supra* note 10, at 1357; *see also*, Staples v. United States, 511 U.S. 600 (1994) (holding that in order to convict a defendant of illegal possession of an automatic weapon the government had to show that the defendant knew the weapon fired automatically).

99. Yaster, *supra* note 10, at 1360; *see also* Pendle, *supra* note 13, at 794 ("The test requires a court to analyze the substantiality of the relationship between a person's status or conduct and an organization's concededly criminal activity."). Or, in the *Scales* Court's own words, a court must "analy[ze]. . . the relationship between the fact of membership and the underlying substantive illegal conduct, in order to determine whether that relationship is indeed too tenuous to permit its

tenuous relationship between the person and the illegal activities of the organization, a modicum of personal guilt or mens rea is required.[100] But, where the person's status or conduct is more closely linked to the organization's illegal activities, evidence of personal guilt is not required.[101] The *Scales* court concluded that the Smith Act required the government to show that a defendant had a specific intent to further an organization's illegal aims because as applied to the defendant in *Scales* the law imposed guilt where there existed only a tenuous relationship between the defendant's membership status and the illegal elements of the organization. But, to take this to mean that all criminal statutes lacking a mens rea requirement must include a specific-intent requirement would be a misreading of the holding in the case. The case actually proposed a test to be applied to the specific facts of each case, not a categorical rule.

Because the *Scales* test requires the consideration of the facts on a case by case basis, as applied to section 2339B and the *HLP* plaintiffs, there is no reason to assume the results would be the same as in *Scales*. While some donations of support would establish a very tenuous relationship between the donor and the illegal activities of the organization, such as a donation of textbooks for school children, other donations could create a very real link between terrorist activity and the donation, such as where a person donates weapons or bomb-making materials. It might also be said that readily fungible donations, like cash, could also serve a strong link between the donor and the illegal activities of the organization, particularly where the donor is aware of the fact that the organization is involved in terrorism.

An analogous situation in criminal law is the conspiracy doctrine. In fact, the *Scales* court used an analogy to conspiracy in its analysis of the Smith Act. Normally, to be convicted of conspiring to commit a crime, the defendant must have had the

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use as the basis of criminal liability. *Scales*, 367 U.S. at 226.

100. *Scales*, 367 U.S. at 226.

101. *Id.* at 226-27. The *Scales* Court provides an example of a person who is a member of an organization that is known to engage in illegal activities. In this scenario, the Court stated:

> [W]e can perceive no reason why one who actively and knowingly works in the ranks of that organization, intending to contribute to the success of those specifically illegal activities, should be any more immune from prosecution than he to whom the organization has assigned the task of carrying out the substantive criminal act.

Id.

intent to further the group's illegal undertaking.[102] But, in limited circumstances, a defendant may be found guilty of conspiracy merely upon knowledge that he or she was dealing in something that is subject to extensive government regulation.[103] For example, where a defendant knowingly supplies a restricted narcotic, specific intent to further an organization's illegal ends can be inferred.[104] But, such intent may only be inferred where there is evidence of "prolonged cooperation" with the organization, or where the actor had a "stake in the venture."[105] Similarly, section 2339B proposes to restrict goods and services that are supplied to a limited number of highly regulated organizations. Thus, by analogy to conspiracy doctrine, "when donations of support have been of such significant quantity or such inherently suspicious or nefarious character to suggest the donor's cooperation with, or stake in, the organization's terrorist activities, proof of the defendant's knowledge would be sufficient even under a strong interpretation of *Scales*."[106]

Arguably, the dissent proposes this "quantum of participation" test from *Scales,* although it skips over the analysis to get there. Justice Breyer stated that when the word "material" is read to modify "support," the statute "can be read to require the Government to show that the defendant knew that the consequences of his acts had a significant likelihood of furthering the organization's terrorist, not just its lawful, aims."[107] Breyer went on to add that when the donor provides truly fungible forms of aid,[108] evidence of such donations will prove a sufficient basis for a successful prosecution.[109] Not so, however, where "support consists of pure speech or association."[110] In Breyer's terms, a conviction on the basis of pure speech is unconstitutional because it conflicts with

102. Yaster, *supra* note 10, at 1380.

103. *Id.* at 1380-81.

104. Direct Sales Co. v. United States, 319 U.S. 703, 713 (1943) (holding that a defendant may be successfully prosecuted for knowingly supplying illegal narcotics since in such circumstances specific intent to further the illegal ends of a conspiracy can be inferred).

105. Yaster, *supra* note 10, at 1383 (citing *Direct Sales Co.,* 319 U.S. at 713).

106. *Id.* at 1383.

107. Holder v. Humanitarian Law Project, 130 S.Ct. 2705 at 2741 (2010) (Breyer, J. dissenting).

108. *See supra* text accompanying note 81 (listing items which J. Breyer concluded were "fungible").

109. *Holder,* 130 S.Ct. at 2741 (Breyer, J. dissenting).

110. *Id.*

the First Amendment, but arguably according to *Scales*, it also runs afoul of the Fifth Amendment since pure speech is too tenuous a connection between the speaker and the organization's illegal activities. Thus, implicitly at least, Breyer was taking into account the "quantum" of the defendant's relationship to the illegal activities of the terrorist organization as required under *Scales*. Accordingly, the dissent's test not only conforms to constitutional requirements, but also seems consistent with precedent.

B. Overbreadth Doctrine—A Missed Opportunity?

Notwithstanding precedent, the majority of the Court in *HLP* disregarded the argument that section 2339B required the Court to infer a heightened mens rea. In eschewing the principle of constitutional avoidance, the Court confronted the constitutional questions head on. Yet, the Court ignored the plaintiffs' overbreadth challenge almost entirely.

The overbreadth doctrine provides that even where the government has a compelling interest in regulating speech or association, the First Amendment requires that the regulation be narrowly drawn so as to impose the least amount of restrictions on constitutionally protected speech and conduct as possible.[111] Proper overbreadth analysis requires inquiry into whether (1) "the statute provide[s] an unlimited and indiscriminate sweep that encroaches upon . . . First Amendment right[s]; (2) if so, is the government's purpose legitimate and substantial; and (3) even if [so] . . . can its purpose be achieved more narrowly?"[112]

The majority of the Court never reached the issue of overbreadth, although arguably that issue was before them. The plaintiffs argued that, "the four challenged provisions are so profoundly indeterminate that they are facially overbroad as well as vague."[113] Having merged their vagueness and overbreadth arguments, the plaintiffs apparently had not punted their First Amendment overbreadth challenge, but merely argued that the fact that the provisions were vague made possible the overly broad application of the statute to otherwise protected speech.[114] The

111. Gustavo Otalvora, *From Stalin to Bin Ladin: Comparing Yesteryear's Anti-Communist Statutes with the Public Employer Provision of the Ohio Patriot Act*, 2010 U. ILL. L. REV. 1303, 1312 (2010).

112. *Id.* at 1313-14.

113. Reply Brief for Humanitarian Law Project, *supra* note 41, at 18.

114. *Id.* at 18-19.

Court, however, disagreed. In the majority's view, the statutory provisions were not vague, and since the plaintiffs had linked their vagueness argument to their overbreadth argument, both arguments failed.[115] This appears contrary to precedent. Historically, the Court has merged the vagueness and overbreadth challenges and held that where a statute overreaches into protected speech, a heightened vagueness standard is applicable.[116]

Since the Court never reached the merits of an overbreadth challenge, future plaintiffs arguably could raise this issue in a separate challenge to the statute.[117] A line of cases dealing with Cold War-era statutes struck down attempts to curb support for communist organizations because in regulating both illegal and protected activities the statutes were not drawn narrowly enough to avoid impermissibly infringing on First Amendment rights.[118] However, in addressing overbreadth challenges to Section 2339B in

115. *Holder*, 130 S.Ct. at 2719. The Court wrote, "[u]nder a proper analysis, plaintiffs' claims of vagueness lack merit. Plaintiffs do not argue that the material-support statute grants too much enforcement discretion to the Government. We therefore address only the [notice issue]." *Id.* at 2719-20. *But see* Reply Brief for Humanitarian Law Project, *supra* note 41, at 18-19 (arguing that vagueness and overbreadth doctrines have often been analyzed together by the Court).

116. *See, e.g.*, United States v. Williams, 553 U.S. 285, 304 (2008) ("Although ordinarily '[a] plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others,' we have relaxed that requirement in the First Amendment context, permitting plaintiffs to argue that a statute is overbroad because it is unclear whether it regulates a substantial amount of protected speech."); Cox v. Louisiana, 379 U.S. 536, 551 (1965) (holding statute facially invalid because it is "unconstitutionally vague in its overly broad scope"); Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 497 (1982) (holding heightened vagueness standard applies where statute implicates free speech).

117. The Court limited its holding to the facts of *HLP*, raising the possibility that on different facts a new challenge could be brought. The Court stated, "[a]ll this is not to say that any future applications of the material-support statute to speech or advocacy will survive First Amendment scrutiny." *Holder*, 130 S.Ct. at 2730.

118. Otalvora, *supra* note 111, at 1312-13. The Court repeatedly held that where constitutionally protected activities fall within the scope of a criminal statute, that statute must be narrowly drawn to avoid too much infringement on constitutional rights. *See, e.g.*, United States v. Robel, 389 U.S. 258, 259-60, 262 (1967) (holding a statute unconstitutional because it swept "indiscriminately across all types of association with Communist-action groups," without distinguishing between the defendant's degree of membership); Whitehill v. Elkins, 389 U.S. 54, 56, 62 (1967) (holding a Maryland statute unconstitutional because it forced teachers to sign an oath and swear they were not members of certain groups); Shelton v. Tucker, 364 U.S. 479, 488 (1960) (holding an Arkansas statute unconstitutional for overly interfering with the rights of association of teachers).

other cases, the Fourth, Seventh, Ninth, and D.C. Circuits have expressed the view that the material support statute is not overly broad because it does not criminalize mere membership in an FTO.[119] But, given recent Supreme Court decisions equating donations with pure political speech[120] there may be a viable argument to be made that the material support statute impermissibly prohibits the types of speech and conduct that receive the strongest protections.

V. CONCLUSION

If ever strict scrutiny was "strict in theory, fatal in fact" it certainly was not so in the minds of the majority in *HLP*. Without a doubt, combating terrorism is a compelling interest that begs urgency and diligent effort. Few would question that the current climate of hostilities asks that U.S. citizens make certain sacrifices. But, how far are we willing to go? The majority of the Court seems to place no limit on how far it would allow the government to go so long as any infringement of fundamental rights are justified by assertions of necessity recorded in Congressional findings and affidavits from the executive. No further inquiry is required. The majority ignored precedent requiring, at a minimum, that the Government show more than a tenuous, membership-based connection between a person's acts and a group's illegal acts in order to conform both with the Due Process Clause and the First Amendment.

However, this is likely not the end of litigation challenging section 2339B. The Court's fact-specific interpretation of the plaintiffs' arguments could permit future litigants to bring a challenge on slightly different facts. Moreover, the Court's opinion probably did not foreclose a challenge on overbreadth grounds, since this issue was treated as though it was not before the Court.

119. Otalvora, supra note 111, at 1313.

120. *See* Citizens United v. Fed. Election Comm'n, 130 S.Ct. 876, 925 (2010) (holding that a ban on corporate expenditures for the promotion of certain political candidates during an election was unconstitutional since the government cannot suppress political speech under the First Amendment.) In *Citizens United*, the Court stated, "political speech must prevail against laws that would suppress it, whether by design or inadvertence. Laws that burden political speech are 'subject to strict scrutiny,' which requires the Government to prove that the restriction 'furthers a compelling interest and is narrowly tailored to achieve that interest.'" *Id.* at 898 (quoting Fed. Election Comm'n v. Wis. Right to Life, Inc., 551 U.S. 449, 464 (2007)).

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